Syed Shaharul bin Mohamed Nasir & Anor v Pentadibir Tanah Daerah Kelang & Anor

HIGH COURT (SHAH ALAM) — JUDICIAL REVIEW APPLICATION NO BA-25–60–10 OF 2018
WONG KIAN KHEONG J
23 MARCH 2020

Land Law — Sale and purchase of land — Registration of charge — Applicant's purchase of land secured by facility — Applicant denied to register charge over purchased land — Whether first respondent estopped by its conduct from relying on s 8(i) of the Malay Reservations Enactment ('the Enactment') — Whether the definition of Malay in s 2 of the Enactment, arts 89(6) or 160(2) of the Federal Constitution applied to term Malay in s 8(i) of the Enactment — Whether first applicant was Malay within meaning of ss 2 and 8(i) of the Enactment — Whether s 8(i) of Enactment barred registration of charge in favour of second applicant — Whether court should exercise its discretion to grant mandamus order to compel first respondent to register Forms 14A and 16A pursuant to s 44(1) of the Specific Relief Act 1950 — Whether applicants entitled to any monetary compensation and/or damages from respondent

The first applicant purchased a piece of land held under title HS(M) 52208, PT No 141946 ('the land') from two Malay co-proprietors ('the co-vendors) at a price of RM700,000. A double-storey shop office building has been erected on the Land which is subject to Federated Malay States' Malay Reservations Enactment ('the Enactment'). The first applicant's purchase of the land was financed by an Islamic financing facility ('the facility') granted by the second applicant Islamic bank ('the second applicant'). The facility required the first applicant to register a charge under the National Land Code ('the Land Code') over the land to secure the first applicant's repayment of the facility. The solicitors for the first and second applicants ('the applicants') presented to the first respondent for registration under the Land Code the 'Form 14A' to register the transfer of title to the land from the co-vendors to the first applicant and 'Form 16A' to register the charge over the land in favour of the second applicant. The first respondent refused to register Forms 14A and 16A ('the first respondent's decision') on the grounds of (a) the certificate of birth of the first applicant's father states that the first applicant's father was an Indian; (b) the first applicant's certificate of birth stated that the first applicant's mother was an Indian Muslim; and (c) Jabatan Pendaftaran Negara Malaysia's letter dated 22 August 2018 stated that the first applicant was an Indian Muslim. In court enclosure No 1 (encl 1), the applicants applied for leave of court to seek an order of mandamus to compel the first respondent to register Forms 14A and 16A under the Land Code and to compel the respondents to pay for

general and special damages to the applicants. Enclosure 1 was allowed by Vazeer Alam bin Mydin Meera J (as he then was). Hence, a substantive judicial review application ('encl 17') has been filed by the applicants against the respondents for the same relief as stated in the above para 6 encl 17 raises the following questions to be decided by the court; (i) whether the first respondent estopped by its conduct from relying on s 8(i) of the Enactment to deny that the first applicant was a Malay; (ii) whether the definition of Malay in s 2 of the Enactment, arts 89(6) or 160(2) of the Federal Constitution applied to the term Malay in s 8(i) of the Enactment; (iii) whether the first applicant a Malay within the meaning of ss 2 and 8(i) of the Enactment ; (iv) whether s 8(i) of the Enactment barred the registration of a charge in favour of the second applicant; v) whether the court should exercise its discretion to grant a mandamus order to compel the first respondent to register Forms 14A and 16A pursuant to s 44(1) of the Specific Relief Act 1950 and whether the applicants were entitled to any monetary compensation and/or damages from the respondent.

Held, allowing encl 17 with costs:

(1) Section 8(i) of the Enactment prohibited transfers of a Malay holding in favour of a person who is not a Malay. If a Malay holding was transferred contrary to s 8(i) of the Enactment, the first respondent shall decide that Form 14A was not fit for registration pursuant to s 301(c) of the Land Code and shall reject Form 14A forthwith under s 298(1) of the Land Code. It was clear that the Enactment fell within the meaning of the phrase any other written law in s 301(c) of the Land Code (see paras 14–15).

(2) The word Malay in s 8(i) of the Enactment should have the meaning as defined in s 2 of the Enactment as s 2 of the Enactment had expressly stated that the definitions provided therein shall apply all the provisions in the Enactment. It was not applied the following definitions of Malay in the construction of s 8(i) of the Enactment as expressly stated in art 89(6) of the Federal Constitution, the definition of Malay in art 89(6) of the Federal Constitution only applied in the interpretation of art 89 of the Federal Constitution; and the definition of Malay in art 160(2) of the Federal Constitution applied in the construction of all provisions in the Federal Constitution except for art 89 of the Federal Constitution; and all written law stipulated in s 2(1)(a) to (e) of the Interpretation Acts (see para 17).

(3) Section 8(i) of the Enactment did not apply to the second applicant because the second applicant did not fall within the phrase 'no Malay holding shall be ... charged ... to any person not being a Malay' in s 8(i) of the Enactment. The second applicant was licensed by the Minister of Finance under s 10(4) of the Islamic Financial Services Act 2013 to carry on Islamic banking business. When s 8(i) of the Enactment was first

introduced, there was no Islamic bank which could provide Islamic financing facility to be secured by way of charges over Malay holdings. Hence, s 8(i) of the Enactment could not have been intended by the law-maker of the Enactment to apply to the second applicant (see para 27).

(4) The court might exercise its discretion to grant an order of mandamus and the court could only give a mandamus order if all the conditions laid down in s 44(1) of the Specific Relief Act were fulfilled. The court allowed a mandamus to be granted to compel the first respondent to register Forms 14A and 16A under the Land Code as all the conditions had been fulfilled (see paras 30–32).

(5) There was no basis to award monetary compensation and/or damages in favour of the applicants against the respondents because as the mandamus order has been granted, the applicants had not suffered any loss from the first respondent's decision and if the applicants had claimed damages by way of an action against the respondents, the court would not have ordered damages to be paid by the respondents to the applicants (see para 34).

[Bahasa Malaysia summary

Pemohon pertama telah membeli sebidang tanah di bawah hak milik HS(M) 52208, PT No 141946 ('tanah tersebut') dari dua pemilik bersama yang berbangsa Melayu ('penjual bersama') dengan harga RM700,000. Bangunan pejabat dua tingkat yang telah didirikan di tanah tersebut adalah tertakluk kepada Enakmen Rizab Melayu Negeri-Negeri Melayu Bersekutu ('Enakmen'). Pembelian tanah pemohon yang pertama telah dibiayai melalui kemudahan pembiayaan Islam ('pembiayaian') yang diberikan oleh pemohon kedua iaitu sebuah bank islam ('pemohon kedua'). Pembiayaian tersebut memerlukan pemohon pertama untuk mendaftarkan gadaian di bawah Kanun Tanah Negara ('Kanun Tanah') atas tanah tersebut untuk pembayaran balik kemudahan oleh pemohon pertama. Peguamcara untuk pemohon pertama dan pemohon kedua ('pemohon-pemohon') mengemukakan kepada responden pertama untuk pendaftaran di bawah Kanun Tanah 'Borang 14A' untuk mendaftarkan pemindahan hakmilik ke tanah dari penjual bersama kepada pemohon pertama dan ' Borang 16A 'untuk mendaftarkan gadaian ke atas tanah atas nama pemohon kedua. Responden pertama enggan mendaftarkan Borang 14A dan Borang 16A ('keputusan responden pertama') dengan alasan: (a) sijil kelahiran bapa pemohon pertama menyatakan bahawa bapa pemohon pertama adalah berbangsa India; (b) sijil kelahiran pemohon pertama menyatakan bahawa ibu pemohon pertama adalah seorang berbangsa India Muslim; dan (c) Surat Jabatan Pendaftaran Negara Malaysia bertarikh 22 Ogos 2018 menyatakan bahawa pemohon pertama adalah seorang India Muslim. Dalam lampiran mahkamah No 1 (lampiran 1), pemohon-pemohon memohon kebenaran mahkamah untuk meminta perintah mandamus untuk

memaksa responden pertama untuk mendaftarkan Borang 14A dan Borang 16A di bawah Kanun Tanah dan memaksa responden membayar ganti rugi am dan khas kepada pemohon-pemohon. Lampiran 1 dibenarkan oleh Vazeer Alam bin Mydin Meera J (ketika itu). Oleh itu, permohonan semakan kehakiman substantif ('lampiran 17') telah difailkan oleh pemohon-pemohon terhadap para responden untuk mendapatkan relif yang sama seperti yang dinyatakan dalam perenggan 6 lampiran 17 yang disebut di atas telah menimbulkan persoalan berikut untuk diputuskan oleh mahkamah; (i) sama ada responden pertama telah diestop dari kelakuannya daripada bergantung pada s 8(i) Enakmen untuk menafikan bahawa pemohon pertama adalah orang Melayu; (ii) sama ada definisi Melayu dalam s 2 Enakmen, perkara 89 (6) atau 160 (2) Perlembagaan Persekutuan digunakan untuk istilah Melayu di s 8(i) Enakmen; (iii) sama ada pemohon pertama orang Melayu dalam ss 2 dan 8(i) Enakmen; (iv) sama ada s 8(i) Enakmen melarang pendaftaran gadaian memihak kepada pemohon kedua; v) sama ada mahkamah harus menggunakan budi bicaranya untuk memberikan perintah mandamus untuk memaksa responden pertama untuk mendaftarkan Borang 14A dan Borang 16A menurut s 44(1) Akta Pelepasan Khusus 1950 dan adakah pemohon-pemohon berhak mendapat pampasan wang dan/atau ganti rugi daripada responden.

Diputuskan, membenarkan lampiran 17 dengan kos:

(1) Seksyen 8(i) Enakmen melarang pemindahan pegangan orang Melayu yang memihak kepada orang yang bukan Melayu. Sekiranya pegangan orang Melayu dipindahkan bertentangan dengan s 8(i) Enakmen, responden pertama akan memutuskan bahawa Borang 14A tidak sesuai untuk didaftarkan mengikut s 301(c) Kanun Tanah dan akan menolak Borang 14A dengan segera di bawah s 298(1) Kanun Tanah. Sudah jelas bahawa Enakmen itu termasuk dalam makna frasa mana-mana undang-undang bertulis lain dalam s 301(c) Kanun Tanah (lihat perenggan 14–15).

(2) Istilah Melayu dalam s 8(i) Enakmen harus memiliki makna sebagaimana yang didefinisikan dalam s 2 Enakmen kerana s 2 Enakmen itu dengan jelas menyatakan bahawa definisi yang disediakan di dalamnya akan digunapakai untuk semua peruntukan dalam Enakmen tersebut. Definisi Melayu berikut adalah tidak digunapakai dalam taksiran s 8(i) Enakmen seperti yang dinyatakan dengan jelas dalam perkara 89(6) Perlembagaan Persekutuan, definisi Melayu dalam perkara 89(6) Perlembagaan Persekutuan akan digunapakai dalam tafsiran perkara 89 Perlembagaan Persekutuan sahaja; dan definisi bahasa Melayu dalam perkara 160(2) Perlembagaan Persekutuan yang digunapakai dalam taksiran semua peruntukan dalam Perlembagaan Persekutuan kecuali untuk perkara 89 Perlembagaan Persekutuan; dan semua

undang-undang bertulis yang ditetapkan dalam s 2(1)(a) hingga (1)(e) Akta Tafsiran (lihat perenggan 17).

(3) Seksyen 8(i) Enakmen tidak terpakai untuk pemohon kedua kerana pemohon kedua tidak termasuk dalam ungkapan 'tidak ada pegangan orang Melayu yang akan ... digadaikan ... kepada mana-mana orang yang bukan orang Melayu' dalam s 8(i) Enakmen. Pemohon kedua dilesenkan oleh Menteri Kewangan berdasarkan s 10(4) Akta Perkhidmatan Kewangan Islam 2013 untuk menjalankan perniagaan perbankan Islam. Ketika s 8(i) Enakmen diperkenalkan pertama kali, tidak ada bank Islam yang dapat menyediakan kemudahan pembiayaan Islam untuk dijamin dengan gadaian ke atas pegangan orang Melayu. Oleh itu, s 8(i) Enakmen tidak mungkin dimaksudkan oleh penggubal undang-undang Enakmen untuk digunapakai kepada pemohon kedua (lihat perenggan 27).

(4) Mahkamah boleh menggunakan budi bicaranya untuk memberikan perintah mandamus dan mahkamah hanya dapat memberikan perintah mandamus jika semua syarat yang ditetapkan dalam s 44(1) Akta Perlepasan Khusus dipenuhi. Mahkamah mengizinkan mandamus diberikan untuk memaksa responden pertama mendaftarkan Borang 14A dan Borang 16A di bawah Kanun Tanah kerana semua syarat telah dipenuhi (lihat perenggan 30–32).

(5) Tiada dasar untuk memberikan ganti rugi dan/atau ganti rugi yang memihak kepada pemohon-pemohon terhadap responden kerana perintah mandamus telah diberikan, pemohon-pemohon tidak mengalami kerugian dari keputusan responden pertama dan jika pemohon telah menuntut ganti rugi melalui tindakan terhadap responden, mahkamah tidak akan memerintahkan ganti rugi dibayar oleh responden kepada pemohon (lihat perenggan 34).]

Cases referred to

Jambatan Merah Sdn Bhd (In liquidation) v Public Bank Bhd [2015] MLJU 1208; [2016] 1 CLJ 811, HC (refd)

Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Legislation referred to

Births and Deaths Registration Act 1957 ss 27(1), (2), (3A), 33(1)

Evidence Act 1950 ss 101(1), (2), 102

Federal Constitution arts 89(6), 160(2)

Interpretation Acts 1948 and 1967 ss 2(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), 3, Part 1

A Islamic Financial Services Act 2013 ss 2(1), 10(4)
Malay Reservations Enactment ss 2, 8, 8(i), 19(i), (ii)
National Land Code ss 4(2)(b), 298(1), 301(c), Forms 14A, 16A
Rules of Court 2012 O 53 r 1(2), O 53 rr 2(3), 5(1)
Specific Relief Act 1950 s 44(1)

B

Azhar Noor bin Abdul Manaf (Zain Johnson & Assoc) for the applicants.
Siti Fatimah bt Talib (Assistant State Legal Advisor, Selangor State Legal Advisor's Office) for the respondents.

C **Wong Kian Kheong J:**

BACKGROUND

[1] The first applicant ('first applicant') purchased a piece of land held
D under title HS(M) 52208, PT No 141946 ('land') from two Malay co-proprietors (co-vendors) at a price of RM700,000.

[2] A double-storey shop office building has been erected on the land which
E is subject to Federated Malay States' Malay Reservations Enactment ('MRE').

[3] The first applicant's purchase of the land is financed by an Islamic financing facility ('facility') granted by the second applicant Islamic bank ('second applicant'). The facility requires the first applicant to register a charge
F under the National Land Code ('the NLC') over the land to secure the first applicant's repayment of the facility.

[4] The solicitors for the first and second applicants ('applicants') presented to the first respondent ('first respondent') for registration under NLC the
G following instruments of dealing:

(a) 'Form 14A' to register the transfer of title to the land from the co-vendors to the first applicant (Form 14A); and

(b) 'Form 16A' to register the charge over the land in favour of the second
H applicant (Form 16A).

[5] The first respondent refused to register Forms 14A and 16A (the first respondent's decision) on the following grounds:

I (a) the 'Certificate of Birth' of the first applicant's father (birth certificate (first applicant's father)) states that the first applicant's father is an Indian;

(b) the first applicant's certificate of birth (birth certificate (first applicant)) states that the first applicant's mother is an Indian Muslim; and

(c) on two written enquiries dated 8 August 2018 and 14 August 2018 by the first respondent, 'Jabatan Pendaftaran Negara Malaysia' (JPN) has sent a letter dated 22 August 2018 (JPN's Letter) which states that the first applicant is an Indian Muslim.

THIS APPLICATION

[6] In court encl No 1 (encl 1), the applicants applied for leave of court to seek the following relief, among others:

(a) an order of mandamus to compel the first respondent to register Forms 14A and 16A under NLC; and

(b) the above-named respondents (respondents) shall pay general and special damages to the applicants which shall be assessed by this court.

[7] Enclosure 1 was allowed by Vazeer Alam bin Mydin Meera J (as he then was). Hence, a substantive judicial review application (encl 17) has been filed by the applicants against the respondents for the same relief as stated in the above para 6.

ISSUES

[8] Enclosure 17 raises the following questions to be decided by this court:

(a) is the first respondent estopped by its conduct from relying on s 8(i) of the MRE to deny that the first applicant is a 'Malay' in this case?

(b) whether the definition of 'Malay' in:

(i) s 2 of the MRE;

(ii) art 89(6) of the Federal Constitution ('the FC'); or

(iii) art 160(2) of the FC

— applies to the term 'Malay' in s 8(i) of the MRE;

(c) in view of:

(i) the birth certificate (first applicant's father) (which states that the first applicant's father is an Indian);

(ii) the birth certificate (first applicant)) (which states that the first applicant's mother is an Indian Muslim); and

(iii) JPN's letter (which states that the first applicant is an Indian Muslim)

— is the first applicant a 'Malay' within the meaning of ss 2 and 8(i) of the MRE? This question discusses the following statutory provisions:

(i) the effect of s 33(1) of the Births and Deaths Registration Act 1957

('the BDRA') regarding the contents of the birth certificate (first applicant) that the first applicant and his father are Malays; and

(ii) there is no correction of the contents of the birth certificate (first applicant) pursuant to s 27(1), (2) and (3A) of the BDRA;

(d) does s 8(i) of the MRE bar the registration of a charge in favour of the second applicant?

(e) whether the court should exercise its discretion to grant a mandamus order to compel the first respondent to register Forms 14A and 16A pursuant to s 44(1) of the Specific Relief Act 1950 ('the SRA'); and

(f) are the applicants entitled to any monetary compensation and/or damages from the respondents?

The aforesaid second to fourth questions are novel.

OVERRIDING EFFECT OF THE MRE

[9] By virtue of s 4(2)(b) of the NLC, NLC is subject to MRE. I reproduce below s 4(2)(b) NLC:

> *4 Savings.*
>
> (1) ...
>
> (2) *Except in so far as it is expressly provided to the contrary, nothing in [NLC] shall affect the provisions of —*
>
> ...
>
> (b) *any law for the time being in force relating to Malay reservations or Malay holdings*;
>
> ...
>
> *and, in the absence of express provision to the contrary, if any provision of [NLC] is inconsistent with any provision of any such law, the latter provision shall prevail, and the former provision shall, to the extent of the inconsistency, be void.* (Emphasis added.)

[10] The overriding effect of MRE is amplified in s 21 of the MRE which provides as follows:

> 21 *Enactment to prevail against provisions of other laws.*
>
> *If in any case any conflict shall arise between the provisions of this Enactment and the provisions of the Land Code, or of the Civil Procedure Code, or of the Powers of Attorney Enactment, the provisions of this Enactment shall prevail.* (Emphasis added.)

IS THE FIRST RESPONDENT ESTOPPED FROM ENFORCING S 8(I) OF THE MRE?

[11] Section 8 of the MRE states as follows:

> 8 *Restriction as to transfer, charges* and leases.

(i) Subject to the provisions of sub-section (ii) and of sections 16 and 17 *no Malay holding shall be transferred, charged*, leased or otherwise disposed of *to any person not being a Malay, and no memorandum of transfer, charge or lease in contravention of this section shall be capable of registration in any Land Office or Registry of Titles*.

(ii) If any land included in a Malay Reservation is sub-divided and sub-divisional titles registered therefor and one or more of the proprietors of such land are Malays and one or more of the proprietors of such land are persons who are not Malays and there are simultaneously presented to the proper registering authority cross-transfers of such sub-divisional titles, such cross-transfers may notwithstanding anything contained in sub-section (i) be registered by such proper registering authority. (Emphasis added.)

[12] The applicants' learned counsel has submitted that the conduct of the first respondent in this case estops the first respondent from denying that the first applicant is a 'Malay'. I am not able to accept this submission because the first respondent cannot be estopped from enforcing a statutory prohibition as embodied in s 8(i) of the MRE. It is decided in *Jambatan Merah Sdn Bhd (In liquidation) v Public Bank Bhd* [2015] MLJU 1208; [2016] 1 CLJ 811 at para [78], as follows:

[78] In respect of the defendant's purported right to exercise remedy as a chargee under s 271(1)(a) NLC, *it is trite law that there can be no application of the issue estoppel doctrine against the operation of a statutory provision* (in this case, the application of s 270(1)(a) NLC). *I cite the following cases*:

(a) in *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404, at 407, *Hashim Yeop Sani CJ (Malaya) held in the Supreme Court as follows —*

On the question of issue estoppel we agree with the learned judge that on the facts of this case the appellants cannot invoke the doctrine of issue estoppel. There can be no estoppel as against statutory provisions. (Emphasis added.);

(b) *Thomas CJ decided as follows in the Court of Appeal of the Federated Malays States in Puran Singh v Kehar Singh* [1939] 1 MLJ 71, at p 75:

The main question argued at the appeal was that the learned trial Judge having held that the registration of Kehar Singh as proprietor of certain lands had been obtained by means of an insufficient or void instrument, vis, an invalid power of attorney, and that it was in consequence void under section 42 (iii) of the Land Code, he was wrong in holding that the plaintiff was estopped by his conduct from objecting to the registration. In support of this contention he cited *Borrow*'s case (1880) 14 Ch D 432 in which it is stated by Bacon, VC, in the course of his judgment that:

> *the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter partes and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament.*

This view is followed in the case of Abdul Aziz v Kanthen Mallik 38 ILR Cal 512

515 in which at page 515 a long list of authorities has been set out. The Court there decided that it was not prepared to accede to the argument that the principle of estoppel overrides the provisions of either section 78 of the Land Registration Act or section 60 of the Bengal Tenancy Act ...

So far as this is an argument on the question of estoppel it cannot in my opinion succeed, since it is only another way of saying that acts of the parties inter se can amount to an estoppel in respect of an Enactment. (Emphasis added.); and

(c) *in Re Salvage Engineers Ltd [1962] 1 28 MLJ 438, at 440, Ong J (as he then was) held in the High Court —*

There can be no estoppel against the operation of a statute. (Emphasis added.)

APPLICATION OF S 8(I) OF THE MRE

[13] The land is 'Malay holding' as understood in s 2 of the MRE as follows:

'Malay holding' includes:

(a) *any registered interest of a Malay as proprietor or co-proprietor in any alienated land included in a Malay Reservation duly declared and gazetted under the provisions of [MRE]*:

Provided that no such interest shall be deemed to be a Malay holding until there shall have been registered against the register document of title for such land a requisition in the Form A in the First Schedule as provided in section 6.

(b) any registered interest of a Malay as proprietor or co-proprietor in any alienated land included in a Malay Reservation duly declared and gazetted under the provisions of the Malay Reservations Enactment, 1913. (Emphasis added.)

[14] Section 8(i) of the MRE (no memorandum of transfer ... in contravention of this section shall be capable of registration in any Land Office or Registry of Titles) prohibits transfers of a Malay holding in favour of a person who is not a 'Malay'. Such a prohibition is fortified by s 19(i) and (ii) of the MRE which provide as follows:

19 *Dealings contrary to Enactment void —*

(i) *All dealings* or disposals *whatsoever and all attempts to deal in or dispose of any Malay holding contrary to the provisions of [MRE] shall be null and void* and no rent paid in pursuance of any such dealing disposal or attempts shall be recoverable in any Court.

(ii) *No action for breach of contract shall lie in respect of any dealing* in or disposal of *or any attempt to deal in* or dispose of *any Malay holding contrary to the provisions of [MRE]*. (Emphasis added.)

[15] If a Malay holding is transferred contrary to s 8(i) of the MRE, the first respondent shall decide that Form 14A is not fit for registration pursuant to s 301(c) of the NLC and shall reject Form 14A 'forthwith' under s 298(1) of the

NLC. I reproduce below the relevant parts of ss 298(1) and 301(c) of the NLC: A

> 298 *Rejection* or suspension *for unfitness*, or absence of certain documents.
>
> (1) *Where any instrument is not fit for registration, the registrar shall reject it forthwith* unless the unfitness consists solely of some formal defect or clerical error.
>
> 301 *When an instrument is fit for registration.* B
>
> *An instrument shall be fit for registration under this Part if, but only if, the following conditions are satisfied —*
>
> ...
>
> (c) *that the dealing which it effects is not contrary to any prohibition* or limitation *imposed by* this Act or *any other written law for the time being in force*, or to any restriction in interest *to which the land in question is for the time being subject* ... C
> (Emphasis added.)

It is clear that MRE falls within the meaning of the phrase 'any other written law' in s 301(c) of the NLC. D

WHICH DEFINITION OF 'MALAY' IS APPLICABLE?

[16] Regarding the meaning of 'Malay' in s 8(i) of the MRE, learned counsel for the applicants and respondents have referred to the term 'Malay' in the following provisions: E

(a) s 2 of the MRE provides a definition of 'Malay' as follows:

> 2 *Interpretation.*
>
> *In this Enactment unless the context otherwise requires*: F
>
> ...
>
> *'Malay' means 'a person belonging to any Malayan race who habitually speaks the Malay language or any Malayan language and professes the Moslem religion'*; G

(b) art 89(6) of the FC defines a 'Malay' for the purpose of art 89 of the FC. Article 89 of the FC provides as follows:

> 89 *Malay reservations.*
>
> (1) Any land in a State which immediately before Merdeka Day was a Malay reservation in accordance with the existing law may continue as a Malay reservation in accordance with that law until otherwise provided by an Enactment of the Legislature of that State, being an Enactment — H
>
> (c) passed by a majority of the total number of members of the Legislative Assembly and by the votes of not less than two–thirds of the members present and voting; and I
>
> (d) approved by resolution of each House of Parliament passed by a majority of the total number of members of that House and by the votes of not less than two-thirds of the members voting.

(1A) Any law made under Clause (1) providing for the forfeiture or reversal to the State Authority, or for the deprivation, of the ownership of any Malay reservation, or of any right or interest therein, on account of any person, or any corporation, company or other body (whether corporate or unincorporate) holding the same ceasing to be qualified or competent under the relevant law relating to Malay reservations to hold the same, shall not be invalid on the ground of inconsistency with Article 13.

(2) Any land in a State which is not for the time being a Malay reservation in accordance with the existing law and has not been developed or cultivated may be declared as a Malay reservation in accordance with that law:

Provided that —

(a) where any land in a State is declared a Malay reservation under this Clause, an equal area of land in that State which has not been developed or cultivated shall be made available for general alienation; and

(b) the total area of land in a State for the time being declared as a Malay reservation under this Clause shall not at any time exceed the total area of land in that State which has been made available for general alienation in pursuance of paragraph (a).

(3) Subject to Clause (4), that Government of any State may, in accordance with the existing law, declare as a Malay reservation —

(a) any land acquired by that Government by agreement for that purpose;

(b) on the application of the proprietor, and with the consent of every person having a right or interest therein, any other land,

and shall, in accordance with the existing law, immediately declare as a Malay reservation, in a case where any land ceases to be a Malay reservation, any other land of a similar character and of an area not exceeding the area of that land.

(4) Nothing in this Article shall authorize the declaration as a Malay reservation of any land which at the time of the declaration is owned or occupied by a person who is not a Malay or in or over which such a person has then any right or interest.

(5) Without prejudice to Clause (3), the Government of any State may, in accordance with law, acquire land for the settlement of Malays or other communities, and establish trusts for that purpose.

(6) *In this Article* 'Malay reservation' means land reserved for alienation to Malays or to natives of the State in which it lies; and *'Malay' includes any person who, under the law of the State in which he is resident, is treated as a Malay for the purposes of the reservation of land*.

(7) Subject to Article 161A, this Article shall have effect notwithstanding any other provision of this Constitution; but (without prejudice to any such other provision) no land shall be retained or declared as a Malay reservation except

as provided by this Article and Article 90.

(8) The provisions of this Article shall apply to the Federal Territories of Kuala Lumpur and Putrajaya in the like manner that they apply to a State, save that Clause (1) in its application to the Federal Territories of Kuala Lumpur and Putrajaya shall be modified to read that any land in the Federal Territory of Kuala Lumpur or the Federal Territory of Putrajaya which immediately before Merdeka Day was a Malay reservation in accordance with the existing law may continue as a Malay reservation in accordance with that law until otherwise provided by an Act of Parliament passed by a majority of the total number of members of each House of Parliament and by the votes of not less than two-thirds of the members present and voting in each House. (Emphasis added.)

(a) art 160(2) of the FC states as follows, among others:

Article 160(2) *In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say —*

...

'Malay' means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and —

(b) *was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore*; *or*

(c) *is the issue of such a person*; (Emphasis added.); and

(a) Part 1 of the Interpretation Acts 1948 and 1967 ('the IA') applies to all written law as stipulated in s 2(1)(a) to (1)(e) of the IA. Part 1 of IA contains s 3 which provides for definitions. According to s 3 of the IA, 'Malay' has the meaning assigned by art 160(2) of the FC.

[17] I am of the view that the word 'Malay' in s 8(i) of the MRE should have the meaning as defined in s 2 of the MRE. This is because s 2 of the MRE has expressly stated that the definitions provided therein shall apply all the provisions in MRE (except where the context of the provision in MRE otherwise requires). I am not able to apply the following definitions of 'Malay' in the construction of s 8(i) of the MRE:

(a) as expressly stated in art 89(6) of the FC, the definition of 'Malay' in art 89(6) of the FC only applies in the interpretation of art 89 of the FC; and

(b) the definition of 'Malay' in art 160(2) of the FC applies in the construction of the following provisions (unless the context of the provision otherwise requires):

(i) all provisions in the FC except for art 89 of the FC (the definition

A of 'Malay' in art 89(6) of the FC is applicable); and

(ii) all written law stipulated in s 2(1)(a) to (1)(e) of the IA.

IS THE FIRST APPLICANT A 'MALAY' UNDER S 2 OF THE MRE?

B **[18]** In this case, ss 8(ii), 16 (sales by encumbrancers) and 17 (land may be charged or leased to government and charged to certain co-operative societies) MRE do not apply.

C **[19]** It is clear that if the first applicant is not a 'Malay' under s 2 of the MRE:

(a) Form 14A is not fit for registration under s 301(c) of the NLC read with ss 8(i) and 19(i) of the MRE; and

(b) the first respondent cannot register Form 14A. Instead, the first
D respondent shall reject forthwith Form 14A pursuant to s 298(1) of the NLC.

[20] Firstly, the first applicant has the:

E (1) legal burden under s 101(1) and (2) of the Evidence Act 1950 ('the EA'); and

(2) evidential burden pursuant to s 102 of the EA

— to satisfy the court that the first applicant is a 'Malay' under ss 2 and 8(i) of
F the MRE. To do so, the first applicant has to prove on a balance of probabilities the following three conditions pursuant to s 2 of the MRE (third condition):

(a) the first applicant belongs to 'any Malayan race' ('first condition');

(b) the first applicant 'habitually speaks the Malay language' ('second
G condition'); and

(c) the first applicant 'professes the Moslem religion' ('third condition').

[21] The first condition is satisfied because the birth certificate (first
H applicant) states the first applicant's 'Race' (Keturunan) is Malay. The birth certificate (first applicant) also states that the first applicant's father is a Malay. According to s 33(1) of the BDRA, the contents of the birth certificate (first applicant) constitute evidence that the first applicant belongs to the 'Malay' race. Section 33(1) of the BDRA states as follows:

I 33 *Entry in register as evidence of birth, death or presumed death.*

(1) *Subject to the provisions of this section an entry or a Certificate of Birth*, Certificate of Death or Certificate of Presumed Death relating thereto purporting to have been duly certified under subsection 32(2) *shall be received without further or other proof as evidence of such facts and particulars relating to such birth, death or presumed death*

as are or were at the time of the making of such entry required by law to be set forth in such entry or certificate. (Emphasis added.)

If there is a 'clerical error' regarding the first applicant's race in the birth certificate (first applicant), in accordance with s 27(2) of the BDRA, the 'Superintendent-Registrar of Births and Deaths' (please see the interpretation provision in s 2 of the BDRA) should have corrected such a clerical error in a manner as directed by the 'Registrar-General of Births and Deaths' (Registrar-General) (as defined in s 2 of the BDRA). Nor was there a correction of the first applicant's race in the birth certificate (first applicant) by the Registrar-General pursuant to s 27(3A) of the BDRA. It is noted that by virtue of s 27(1) of the BDRA, there cannot be any alteration of the 'register of births and deaths' (defined in s 2(a) of the BDRA) except as authorised by of the BDRA.

Section 27 of the BDRA provides as follows:

27 *Correction of errors and alteration in register.*

(1) *No alteration in any register shall be made except as authorized by this Act*.

(2) *Any clerical error which may from time to time be discovered in any register may be corrected by the Superintendent-Registrar, in such manner as the Registrar-General shall direct*.

(3) *Any error of fact or substance in any register may be corrected by the Registrar-General* upon payment of the prescribed fee *and upon production by the person requiring such error to be corrected of a statutory declaration setting forth the nature of the error and the true facts of the case, and made by two persons required by this Act to give information concerning the birth, still-birth or death with reference to which the error has been made, or in default of such persons then by two credible persons having knowledge to the satisfaction of the Registrar-General of the truth of the case; and the Registrar-General may if he is satisfied of the facts stated in the statutory declaration cause such entry to be certified and the day and the month and the year when such correction is made to be added thereto*.

(3A) *Where the Registrar-General, the Superintendent-Registrar or the Registrar is satisfied that from an inquiry held under section 37B an error of fact or substance in any register exists, the error of fact or substance may be corrected by the Registrar-General*.

(4) Where an error of fact or substance occurs in the information forwarded by a Coroner or Magistrate under section 24 the Coroner or Magistrate, if satisfied that such error exists, may certify under his hand to the appropriate Superintendent-Registrar the nature of the error and the true facts of the case as ascertained by him, and the error may thereupon be corrected by such Superintendent-Registrar. (Emphasis added.)

[22] I decide that the first respondent cannot rely on:

(a) the birth certificate (first applicant's father) which states that the first applicant's father is an Indian;

A (b) the birth certificate (first applicant) which states that the first applicant's mother is an Indian Muslim; and

(c) JPN's Letter which states that the first applicant is an Indian Muslim.

The above decision is based on the following reasons:

B (i) by reason of s 33(1) of the BDRA, weight should be given to the first applicant's race as stated in the birth certificate (first applicant) — please see the above para 21. The birth certificate (first applicant) also states that the first applicant's father is a Malay;

C (ii) there was no correction of the race of the first applicant and his father in the birth certificate (first applicant) in accordance with s 27(1), (2) and (3A) of the BDRA; and

(iii) by reason of s 27(1), (2) and (3A) of the BDRA, JPN's letter cannot D correct or alter the race of the first applicant and his father in the birth certificate (first applicant).

[23] It is not disputed in this case that the first applicant habitually speaks Malay and is a Muslim. Hence, the fulfilment of the second and third E conditions.

[24] The court may review a decision of a public officer if, among others, the decision involves an illegality — please see the judgment of Raus Sharif FCJ (as he then was) in the Federal Court case of *Ranjit Kaur a/p S Gopal Singh v Hotel* F *Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629, at para [15]. In this case, the first respondent's decision (in not registering Form 14A) is illegal due to the following reasons:

(a) the first respondent has failed to give effect to s 33(1) of the BDRA G regarding the weight to be attached to the race of the first applicant and his father as stated in the birth certificate (first applicant); and

(b) in view of s 27(1), (2) and (3A) of the BDRA, the first respondent has wrongly relied on JPN's letter.

H DOES S 8(i) OF THE MRE BAR REGISTRATION OF CHARGE IN FAVOUR OF THE SECOND APPLICANT?

[25] Section 2 of the MRE has provided the following definition when a company may be deemed to be a 'Malay' (Malay company):

I *For the purposes of [MRE] a company registered under Companies Enactment [Cap. 58] shall if and so long as every member thereof is a Malay and the transfer of shares therein is restricted by the Articles of Association thereof to Malays be deemed to be a Malay*, and any registered interest in land of which such a company is proprietor shall be deemed to be a Malay holding. (Emphasis added.)

[26] The definition of Malay company in s 2 of the MRE does not apply to the second applicant in this case. **A**

[27] I am of the view that s 8(i) of the MRE does not apply to the second applicant because: **B**

(a) the second applicant does not fall within the phrase 'no Malay holding shall be ... charged ... to any person not being a Malay' in s 8(i) of the MRE. This is because the second applicant is licensed by the Minister of Finance under s 10(4) of the Islamic Financial Services Act 2013 ('the IFSA') to carry on 'Islamic banking business' (defined in s 2(1) of the IFSA). When s 8(i) of the MRE was first introduced, there was no Islamic bank which could provide Islamic financing facility to be secured by way of charges over Malay holdings. Hence, s 8(i) of the MRE could not have been intended by the law-maker of of the MRE to apply to the second applicant; and **C** **D**

(b) s 8(i) of the MRE should be construed in a purposive manner. Charges may be created over Malay holdings in favour of licensed financial institutions so as to enable Malay owners of Malay holdings ('owners') to develop the Malay holdings for the benefit of the owners in particular and the Malay community in general. If otherwise, Malay holdings may be left idle without any financing to develop and unlock the true value of Malay holdings. **E**

[28] As explained in the above para 27, although charges may be registered under NLC over Malay holdings in favour of licensed financial institutions, if the charges are enforced by way of orders of sale by way of public auction, in accordance with s 8(i) of the MRE, the Malay holdings can only be sold and transferred to the following persons: **F**

(a) individuals who are Malays as understood in s 2 of the MRE — please see the three conditions as explained in the above sub-paras 20(a) to (c); and **G**

(b) Malay Companies as defined in s 2 of the MRE.

[29] The first respondent's decision (in not registering Form 16A) is unlawful because the first respondent has misconstrued s 8(i) of the MRE — please see the above para 27. **H**

WHETHER THE COURT SHOULD GRANT A MANDAMUS ORDER IN THIS CASE? **I**

[30] As the first respondent's decision is illegal for reasons explained in the above paras 21–24, 27 and 29, the court may exercise its discretion to grant an

order of *mandamus* in this case.

[31] The court can only give a mandamus order if all the conditions laid down in s 44(1) of the SRA (conditions (mandamus order)) are fulfilled — please see the judgment of Abdul Hamid Mohamad CJ in the Federal Court case of *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641, at para [13]. Section 44(1) SRA provides as follows:

> *Power to order public servants and others to do certain specific acts* 44(1) *A Judge may make an order requiring any specific act to be done* or forborne, *by any person holding a public office, whether of a permanent* or a temporary *nature*, or by any corporation or any court subordinate to the High Court:
>
> *Provided that —*
>
> (a) *an application for such an order be made by some person whose property*, franchise, or personal right *would be injured by the forbearing* or doing, as the case may be, *of the said specific act*;
>
> (b) *such doing* or forbearing *is, under any law for the time being in force, clearly incumbent on the person* or court *in his or its public character*, or on the corporation in its corporate character;
>
> (c) *in the opinion of the Judge the doing* or forbearing *is consonant to right and justice*;
>
> (d) *the applicant has no other specific and adequate legal remedy*; *and*
>
> (e) *the remedy given by the order applied for will be complete*. (Emphasis added.)

The mandatory effect of the conditions (mandamus order) in s 44(1) of the SRA is reiterated by O 53 r 1(2) of the Rules of Court 2012 ('the RC'). O 53 r 1(2) of the RC provides as follows:

> O 53 r 1(2) *This Order is subject to the provisions of Chapter VIII of Part 2 of [SRA].* (emphasis added).

Chapter VIII of Part 2 of SRA contains, among others, s 44 of the SRA.

[32] I have no hesitation to exercise my discretion to grant a mandamus order to compel the first respondent to register Forms 14A and 16A under the NLC (mandamus order). This is because all the conditions (mandamus order) have been fulfilled as follows:

(a) the first respondent holds a 'public office' of a 'permanent' nature under the NLC;

(b) the mandamus order requires the first respondent to do a 'specific act', namely the registration of Forms 14A and 16A under the NLC (Specific Act);

(c) the application for the mandamus order is made by the applicants whose proprietary rights in the land and proposed NLC charge over the Land would be 'injured' by the first respondent's 'forbearing' of the Specific Act — please refer to proviso (a) to s 44(1) of the SRA;

(d) the doing of the Specific Act under the applicable law is 'clearly incumbent' on the first respondent in the first respondent's public character — please refer to proviso (b) to s 44(1) of the SRA;

(e) the doing of the Specific Act is 'consonant to right and justice' as required by proviso (c) to s 44(1) of the SRA;

(f) as explained in proviso (d) to s 44(1) of the SRA, the applicants have 'no other specific and adequate legal remedy'; and

(g) the mandamus order 'will be complete' within the meaning of proviso (e) to s 44(1) of the SRA.

CAN THE APPLICANTS CLAIM MONETARY COMPENSATION AND/OR DAMAGES FROM THE RESPONDENTS?

[33] In a judicial review application, the court may grant monetary compensation and/or damages. This is clear from O 53 rr 2(3) and 5(1) of the RC which state as follows:

> O 53 r 2(3) *Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may* dismiss the application or *make any orders, including an order of* injunction or *monetary compensation*:
>
> Provided that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1956 [Act 359] and section 54 [SRA].
>
> *Damages*
>
> O 53 r 5(1) *On an application for judicial review the Court may, subject to paragraph (2), award damages to the applicant if —*
>
> (a) *he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates; and*
>
> (b) *the Court is satisfied that, if the claim has been made in an action begun by the applicant at the time of making his application, he could have been awarded damages*.
>
> (2) Order 18, rule 12, shall apply to a statement relating to a claim for damages as it applies to a pleading. (Emphasis added.)

[34] There is no basis for this court to award monetary compensation and/or damages in favour of the applicants against the respondents because:

(a) as the mandamus order has been granted in this case, the applicants have not suffered any loss from the first respondent's decision; and

(b) if the applicants have claimed damages by way of an action against the respondents (action), the court in the action would not have ordered damages to be paid by the respondents to the applicants — please refer to O 53 r 5(1)(b) of the RC.

THE COURT'S DECISION

[35] Based on the above evidence and reasons, encl 17 is allowed to the following extent only:

(a) the mandamus order is granted to compel the first respondent to register Forms 14A and 16A under NLC by or before 5pm, 21 February 2020; and

(b) costs of encl 17 shall be paid by the respondents to the applicants.

[36] I end this judgment with the hope that MRE can be updated (if not reformed) so as to enable financing of the development of Malay holdings in the interest of:

(a) their Malay owners in particular; and

(b) the Malay community and the country as a whole.

Enclosure 17 allowed with costs.

Reported by Mohd Kamarul Anwar